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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 701

MAY F. MILLER,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOHN E. MARTIN,
Attorney General of Wisconsin,
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Appellee.

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WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLEE'S STATEMENT OPPOSING JURISDICTION.

Pursuant to Paragraph 3 of Rule 12 of the Rules of the United States Supreme Court, appellee files this statement opposing appellate jurisdiction.

Nature of the Case.

This appeal is from a judgment of the Supreme Court of the State of Wisconsin, affirming an assessment of gift taxes, imposed by the Statutes of Wisconsin, against the appellant. The case is reported *Miller* v. *Department of Taxation,* 238 Wis. 287 (Adv. Sh.), 299 N. W. 28 (Adv. Sh.).

Said judgment was entered June 25, 1941, in proceedings in the courts of the State of Wisconsin to review said assessment and the order and decision of the Wisconsin Board of Tax Appeals, which affirmed the same. The taxes involved were assessed pursuant to the provisions of Section 4, of Sec. 72.75, Wis. Stats., 1937. On January 7, 1938 the husband of the appellant made a gift to a trustee of Twenty-five Thousand ($25,000.00) Dollars in trust to invest and accumulate the income during the life of the donor and then to pay over to the appellant, the wife of the donor, said trust funds, including the accumulated income. The controversy arises over the value of said gift for the benefit of the appellant. The assessment involved is based upon a valuation of Twenty-five Thousand ($25,000.00) Dollars as the value of said gift. Appellant contends that the value of the gift for gift tax purposes was Seventeen Thousand Thirty-one ($17,031) Dollars instead of Twenty-five Thousand ($25,000.00) Dollars. At the time of the gift the donor, donee and the trustee were all residents of the State of Wisconsin and thus no question of jurisdiction is involved.

Statutes Involved.

The Wisconsin gift tax law, under which the tax here involved was assessed, was enacted by Section 4 of Chapter 363, Laws of Wisconsin, 1933, and amended by Ch. 15, Laws of 1935. The pertinent provisions of said law, as so amended, are as follows:

> "SECTION 4. EMERGENCY GIFT TAX. (1) An emergency tax is imposed upon transfers of property, real, personal or mixed, or any interests therein or income therefrom, in trust or otherwise, to any person, association or corporation, which are made subsequent to the effective date of this act and prior to July 1, 1939, in the following cases, except as hereinafter provided.
>
> "(a) When the transfer is by gift from any person who at the date of such gift was a resident of the state.

"(b) When the transfer is by gift of property within the state or within its jurisdiction and the donor was a nonresident of the state at the date of such gift.

"(c) * * *.

"(2) (a) If the transfer is made in property, the clear market value thereof at the date of the gift shall be considered the taxable value of the gift. * * *

"(b) * * *.

"(c) The commissioner of insurance shall, on application of the tax commission, determine the value of any future or contingent estates, income, or interests therein, limited, contingent, dependent or determinable upon the life or lives of the person or persons in being to whom the transfer is made and certify the same to the commission, and his certificate shall be presumptive evidence that the method of computation adopted therein is correct.

"(d) Whenever a transfer of property is made upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value as of the time of the transfer. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method, standard of mortality and rate of interest employed by the commissioner of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that for every future or limited estate, income, interest or annuity the value of which is not based upon an assumed rate of interest, the rate of interest for making such computation shall be five per cent per annum. The tax so determined shall be construed to be upon the transfer of a proportion of the principal or corpus of the property equal to the present value of such future or limited estate, income, interest or annuity, and not upon any earnings or income of said

property produced after the gift, and such earnings or income shall not be exempt from income tax.

"(3) * * *.

"(4) * * *.

"(5) * * *.

"(6) * * *.

"(7) (a) * * *.

"(b) * * *.

"(c) The assessor of incomes of the district in which the donee resides shall assess the tax due on such transfers, unless the donee is a non-resident in which event the assessor of incomes in the district in which the donor resides shall assess such tax. * * *

"(d) Notice of the assessment with the amount thereof shall be given by the tax commission or the assessor of incomes to the donor and donee by registered mail. All such taxes shall be due and payable within thirty days from the receipt of such notice of assessment, and the donee shall be personally liable for such tax until paid. In the event that such tax is not paid when due, then both the donor and the donee shall be jointly and severally liable for its payment. * * *

"* * *."

The remaining provisions of said law, as set forth in said section, specifying the rates of tax, exemptions, and methods of assessment and collection, are not here material.

Statement of Facts.

On January 7, 1938, Fred A. Miller, a resident of Wisconsin, set up an irrevocable trust with O. F. Treichler, a Wisconsin resident as trustee, and his wife May F. Miller, the appellant, as beneficiary. The settlor transferred Twenty-five Thousand ($25,000.00) Dollars to the trustee

for the uses and purposes of the trust. The trust instrument, of which a copy is annexed to the appellant's jurisdictional statement and marked Exhibit "A", provides that the trustee shall hold, invest and reinvest, and administer said sum during the life of the settlor. It further provides that said sum and the proceeds thereof shall constitute the corpus of the trust fund and that the trustee shall retain, accumulate, and invest and reinvest the net income therefrom in the same manner as provided in respect to the corpus. It then provides that "said trust shall endure for the period of the natural life of the donor, upon the termination of which, said corpus and the accumulated income thereof shall be delivered, paid over, and distributed to May F. Miller, the wife of the donor and the beneficiary of this trust."

The donor was born April 17, 1867 and was seventy-one years of age, at his next birthday, at the time of the creation of the trust. Under the statutory table, sec. 314.07, Wisconsin Statutes, his life expectancy at the time of the gift was eight years.

The Commissioner of Insurance of the State of Wisconsin, pursuant to the provisions of Section 4, subsecs. (1) (d) of Sec. 72.75, Wisconsin Statutes 1937, and a request by the Wisconsin Department of Taxation, determined the value of the interest of the appellant May F. Miller in the gift of the Twenty-five Thousand ($25,000.00) Dollars and the future accumulated income thereon, all of which was to become payable to her at the death of the donor, Fred A. Miller, to be Twenty-five Thousand ($25,000.00) Dollars as of the time of the gift.

This valuation of such future interest in said trust was arrived at by the use of the method prescribed by said statutory provision. The Twenty-five Thousand ($25,000.00) Dollars originally transferred to the trustee, at the assumed interest rate of five (5%) per cent compounded annually

would have an accumulated value at the end of the eight years of Thirty-six Thousand Nine Hundred Thirty-six and 38/100 ($36,936.38) Dollars, or in other words, the assumed accumulated income thereon during that period would be Eleven Thousand Nine Hundred Thirty-six and 38/100 ($11,936.38) Dollars. This Thirty-six Thousand Nine Hundred Thirty-six and 38/100 ($36,936.38) Dollars, consisting of the aggregate of the Twenty-five Thousand ($25,000.00) Dollars original corpus and the Eleven Thousand Nine Hundred Thirty-six and 38/100 ($11,936.38) Dollars assumed income accumulated during the trust period, is the amount of the future estate given by the donor to the appellant May F. Miller by the creation of this trust. The present value of such future estate is that amount which, if invested at the time of the gift at five (5%) per cent compound interest, would yield Thirty-six Thousand Nine Hundred Thirty-six and 38/100 ($36,936.38) Dollars at the end of the trust period, which by the mortality tables is assumed to be eight years. By discounting the Thirty-six Thousand Nine Hundred Thirty-six and 38/100 ($36,936.38) Dollars future estate for the eight years at the same five (5%) per cent assumed rate, the amount is Twenty-five Thousand ($25,000.00) Dollars. Thus it was determined by the Commissioner of Insurance that the value at the time of the gift of the interest of the appellant in said trust was Twenty-five Thousand ($25,000.00) Dollars. An assessment of gift tax was accordingly made against the appellant as the donee of a gift having a present value of Twenty-five Thousand ($25,000.00) Dollars at the time of the gift.

Appellant contended and still contends that the value of said gift in trust for her benefit is Seventeen Thousand Thirty-one ($17,031.00) Dollars, which is the present value of only the Twenty-five Thousand ($25,000.00) Dollars, payable eight years hence, on a five (5%) per cent discounted basis. The appellant objected to said assessment and, pur-

suant to provisions of the Wisconsin Statutes therefor, said assessment was reviewed successively by the Wisconsin Board of Tax Appeals, the Circuit Court for Milwaukee County, and finally the Supreme Court of the State of Wisconsin, all of which affirmed said assessment.

The judgment of the Supreme Court of Wisconsin affirming said assessment was dated June 25, 1941 and is reported: *Miller* v. *Department of Taxation,* 238 Wis. 287 (Adv. Sh.) 299 N. W. 28 (Adv. Sh.).

No Substantial Federal Question is Presented.

1. *The decision of the Wisconsin Supreme Court construing and holding applicable the provisions of the Wisconsin Statutes is binding on this Court.*

In its decision the Supreme Court of Wisconsin construed the provision of paragraphs (c) and (d) of Subsection (2) of Section 4 of Chapter 363 Laws of 1933, as amended, of the Wisconsin Statutes as applicable to and providing for the assessment of a gift tax at a valuation of Twenty-five Thousand ($25,000.00) Dollars upon appellant's interest as the donee-beneficiary in the trust created. Such construction of and decision by the Wisconsin Supreme Court as to the applicability of its own State statutes in binding upon and accepted by this Court. *Madden* v. *Commonwealth of Ky.,* 309 U. S. 83, 60 S. Ct. 406, 84 L. Ed. 590, 125 A. L. R. 1383.

2. *The sole question raised here is one of equal protection under the Fourteenth Amendment.*

In the appellant's jurisdictional statement the only basis of jurisdiction is a contention that the assessment of the tax in question in accordance with the provisions of the Wisconsin Statutes imposing the same, constitutes a denial of equal protection in violation of the Fourteenth Amendment.

The foundation of such contention is the claim of the appellant that a gift of Twenty-five Thousand ($25,000.00) Dollars to be paid to the donee at a future date, together with the income that has accumulated thereon from the time of the gift to such future date, is inherently and essentially different from a present outright gift of Twenty-five Thousand ($25,000.00) Dollars, because in the latter case there is a transfer to the donee of the present enjoyment and possession. It is then contended that therefore the two gifts have a different present value. Appellant asserts that a present outright gift of Twenty-five Thousand ($25,000.00) Dollars has a present value of Twenty-five Thousand ($25,000.00) Dollars, but that the gift here of Twenty-five Thousand ($25,000.00) Dollars to be paid at a future date, together with the accumulated future income to that date, in which case the possession and enjoyment of both the principal and the interest is postponed until the future date, but only a present value equal to the present discounted value of only the Twenty-five Thousand ($25,000.00) Dollars, payable at such future date.

Based thereon it is contended by appellant that because the tax here involved on such future estate created by the gift is the same tax that is payable upon a present outright gift of Twenty-five Thousand ($25,000.00) Dollars, there is a denial of equal protection to appellant. In the final analysis appellant's claim is that a gift of Twenty-five Thousand ($25,000.00) Dollars payable at a future date, together with the future income thereon accumulated to that date is so different from and unlike a present outright gift of Twenty-five Thousand ($25,000.00) Dollars that they are in separate classes, and therefore because the provisions of the Wisconsin Statute, Sec. (2) (d) of Section 4, Chap. 363 Laws of 1933, as amended, provided for the taxation of both at the same value as of the time of the gift, the donor here

is denied equal protection in violation of the Fourteenth Amendment of the United States Constitution.

3. *The decision of the Wisconsin Supreme Court is in accord with decisions of this Court and so clearly right as not to be a proper subject of review.*

In its opinion at page 290, the Supreme Court of Wisconsin, after construing the provisions of Sec. 72.75 (4) (2) (d), Wis. Stats. 1937, and holding that it was applicable to the instant gift, said as follows:

> "There can be no claim of lack of equal protection of the law under the Fourteenth Amendment to the United States Constitution, for the appellant is treated like all other persons in the same class, i. e., recipients of a principal plus the interest under a trust."

It is fundamental and well established that the equal protection clause of the Fourteenth Amendment does not prohibit reasonable classification for purposes of taxation, so long as classifications rest upon a reasonable relation to the subject-matter and all persons similarly situated are treated alike.

Nashville C. & St. L. Ry. v. *Browning,* 310 U. S. 362, 60 Sup. Ct. 968, 84 L. Ed. 1254;

Madden v. *Commonwealth of Ky.,* 309 U. S. 83, 60 Sup. Ct. 406, 84 L. Ed. 590, 125 A. L. R. 1383;

Welch v. *Henry,* 305 U. S. 134, 59 Sup. Ct. 121, 83 L. Ed. 87, 118 A. L. R. 142;

Carmichael v. *So. Coal & Coke Co.,* 301 U. S. 495, 57 Sup. Ct. 868, 81 L. Ed. 1245, 109 A. L. R. 1317;

Louis K. Liggett Co. v. *Lee,* 288 U. S. 517, 53 Sup. Ct. 481, 77 L. Ed. 929, 85 A. L. R. 699;

Northwestern Mutual Life Ins. Co. v. *Wisconsin,* 247 U. S. 132, 38 Sup. Ct. 444, 62 L. Ed. 1025.

It has been specifically held that there is no denial of equal protection where different standards are used in fixing values of different classes of property or taxing different classes of property at different percentages of their real value. *Klein* v. *Board of Tax Supervisors of Jefferson County*, 282 U. S. 19, 51 Sup. Ct. 15, 75 L. Ed. 140, 73 A. L. R. 699. It is also well established that a State may tax certain classes of property to the exclusion of other classes. *Lake Superior Consolidated Iron Mines* v. *Lord*, 271 U. S. 577, 46 Sup. Ct. 627.

The question here is not one of uniformity but of equal protection. Appellant has never contended below and does not now contend that there is no reasonable basis of differentiation between a gift of the type here involved and an outright gift of twenty five thousand ($25,000.00) dollars. In fact her contention is that they are so essentially different and distinct that they must not be treated alike.

If appellant's contention that an outright gift of the present possession and enjoyment of twenty-five thousand ($25,000.00) dollars is so different from a gift of twenty-five thousand ($25,000.00) dollars and accumulated income, payable at a future date, as to put them in separate classes, then the State could tax them differently and there would be no violation of the equal protection laws of the Fourteenth Amendment. If the provisions of Sec. 72.75, Subsec. (4), Wisconsin Statutes, in dealing with the determination of the value for gift tax purposes of such a gift of a future interest do constitute a dealing with such gifts in a different way than is used in the determination of the value of a present outright gift of twenty-five thousand ($25,000.00) dollars, it is based upon a valid classification. This must be so if appellant's contention that the two types of gifts are essentially different is correct. Thus viewed, the Wisconsin statute is perfectly valid, as is likewise the tax here involved assessed in accordance therewith.

But if, on the other hand, the two types of gifts are not so different that they can be classified and treated separately, then there is no denial of equal protection in the instant case, because the amount of tax payable on each under the statutory method of valuation is exactly the same. Taxation of both types of gifts upon the same basis and resulting in the same tax cannot result in the denial of equal protection.

It is self-evident that there is no denial of equal protection if both gifts are in the same class and are taxed in the same amount. Likewise, if they are not in the same class, but are taxed by different methods resulting in the same amount of tax, it seems equally apparent that there is no denial of equal protection. Either the recipients of the two gifts are in the same class in which instance they are taxed at the same amount or else they are in a different class founded upon a reasonable distinction between them and by separate methods they are both taxed upon such basis, and in neither case is there any denial of equal protection.

Thus the appellant's complaint, inasmuch as she claims that the two types of gifts are in separate classes, must be that the statute treats both classes alike. It is anomalous to urge that the taxation of two gifts, which are so distinct and different as to be in different classes and therefore may be taxed differently, at the same amount is a denial of equal protection. For such a result to constitute a denial of equal protection it would have to be established and held that, not only may a State differently tax properties which are in different classifications, but it *must* do so. In no case has this Court ever held that the equal protection provisions of the Fourteenth Amendment require that a State must tax properties which are in different classes at different rates or valuations. The cases of *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239; *Cumberland Coal Co.* v. *Board of*

Review, 284 U. S. 23, and *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, cited by appellant as relied upon to sustain jurisdiction, do not stand for any such proposition of law.

In the case of *Iowa-Des Moines National Bank* v. *Bennett,* 284 U. S. 239, there was an admitted discrimination against the appellant banks in that they were paying higher taxes than other monied institutions of similar function, and accordingly the Court held it was a violation of the equal protection clause because this was contrary as to national banks to the Federal statute permitting State taxation thereof uniformly with other monied institutions or because as to the other appellant banks this was discrimination within the class. The condemned assessments of coal lands in *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23, were based upon the use of a specified sum per acre for all coal lands entirely disregarding the differences in actual and market value of the lands, that existed due to distances from transportation facilities and other similar factors. This again was clearly discrimination within the same class. In *Raymond* v. *Chicago Traction Co.,* 207 U. S. 20, the assessments were held to be violative of the equal protection clause, because the appellant's property was assessed at different rates and by different methods from that which was used for like properties of other corporations of the same class. All of these cases are instances of different treatment of persons and properties in the same class.

In the instant appeal either the gift of the appellant is, as claimed by her, in a separate class from an outright gift of Twenty-five Thousand ($25,000.00) Dollars, in which instance she could not claim any denial of equal protection if she were taxed thereon at a different rate or method, or the gift of the appellant is in the same class with the outright gift in which case there is no denial of equal protection, because the tax is the same in both instances. Which ever approach appellant takes to the situation, there is no

showing by her that persons in the same class are not taxed alike. The Supreme Court of Wisconsin so held.

But, in any event, the present value of an outright gift of Twenty-five Thousand ($25,000.00) Dollars and the present value of the gift here involved are identically the same. The appellant is admittedly the sole and exclusive beneficiary of the instant gift in trust. She thus received a gift of the entire beneficial interest in the property parted with by the donor. His entire interest in the property was transferred. Just before he made the gift the Twenty-five Thousand ($25,000.00) Dollars had a value of Twenty-five Thousand ($25,000.00) Dollars. The value of the beneficial interest in the gift just at the instant of the gift would not be less and as the appellant as the donee-beneficiary received the entire beneficial interest in the trust property, Twenty-five Thousand ($25,000.00) Dollars was likewise the value of the gift thereof to her at the time of the gift. The use of the method prescribed by the Wisconsin Statutes and as applied to and used in the determination of the value of the gift to the appellant arrives at a result conformable to the actualities just previously stated.

From the foregoing it appears that the decision of the Supreme Court of Wisconsin on the Federal question was so plainly right as not to require reargument, and, therefore, no substantial Federal question is presented. *Re Boardman*, 169 U. S. 39, 42 L. Ed. 653, 18 S. Ct. 291; *Re Spies*, 123 U. S. 131, 31 L. Ed. 80, 8 Sup. Ct. 22.

Respectfully submitted,

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Attorney General of Wisconsin;
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Assistant Attorney General of Wisconsin,
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No. 701

MAY F. MILLER,

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Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

MOTION TO DISMISS APPEAL OR AFFIRM.

Comes now the Wisconsin Department of Taxation, Appellee herein, by John E. Martin, Attorney General of the State of Wisconsin and Harold H. Persons, Assistant Attorney General of the State of Wisconsin, its counsel, and moves this Court to dismiss, with costs, the appeal taken herein to this Court by May F. Miller, from the judgment of the Supreme Court of the State of Wisconsin, dated June 25, 1941, upon the following grounds:

1. No substantial Federal question is presented.

2. The decision of the Supreme Court of Wisconsin was so plainly right as not to require reargument.

In the alternative appellee moves this Court to affirm on the ground that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

Dated this 23rd day of September, 1941.

JOHN E. MARTIN,
Attorney General of the State of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of the State of Wisconsin,
Counsel for Appellee.

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